

---

**OPINION OF THE PUBLIC ACCESS COUNSELOR**

---

MICHAEL V. PITTMAN,  
*Complainant,*

v.

CITY OF MADISON HISTORIC DISTRICT BOARD OF  
REVIEW  
*Respondent.*

---

Formal Complaint No.  
18-FC-88

---

Luke H. Britt  
Public Access Counselor

---

BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging that the City of Madison Historic District Board of Review (“District Board”) violated the Access to Public Records Act<sup>1</sup> (“APRA”). The District Board filed a response to the complaint with this Office through attorney Devon M. Sharpe. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received

---

<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

by the Office of the Public Access Counselor on June 11, 2018.

## **BACKGROUND**

Michael V. Pittman (“Complainant”) claims the City of Madison Historic District Board of Review violated the Access to Public Records Act by denying him access to a copy of the draft of new District Guidelines announced by the Board at a May review meeting.

On May 31, 2018, Pittman requested a copy of new guidelines for the district, which were referenced at a prior meeting. The District Board denied Pittman’s request as the document was still in draft form. Ultimately, the draft was denied as being attorney work product and deliberative materials pursuant to Indiana Code sections 5-14-3-4(b)(2) and (b)(6) respectively.

The District Board responded to the formal complaint arguing the Guidelines were very much a work in progress and still in draft form. Further, the Board argues that the draft document is not a public record at all because it is in the deliberation stage and because it contains privileged communication from an attorney.

## **ANALYSIS**

### **1. The Access to Public Records Act (“APRA”)**

The Access to Public Records Act (“APRA”) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1.

The City of Madison Historic District Board of Review is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the District Board’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

## **2. Deliberative Materials Exception**

One of the discretionary exclusions to disclosure is concept of “deliberative materials.” Deliberative materials are defined by statute as:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). By definition, this exception is considerably broad. So broad, in fact, that is it often called the exception that swallows the rule. The rule, of course, being that public records carry a presumption of disclosability

as opposed to starting with an exception and working backward toward transparency.

Often times working drafts and the development of materials qualify as deliberative without being an overreach. The decision is the adoption of the document. Records created toward that end, so long as they are expressions of opinion or are of a speculative nature, can very much be withheld as deliberative.

And so it is in the instant case. The draft copy of the guidelines is part of the decision-making process and the development of *potential guidelines for inclusion* is speculative until ratified. Once a draft is ready for vote – regardless of whether the vote is successful – each draft subject to a vote *is* disclosable.

That said, some assertions raised by the Board in response to the complaint are problematic. First, the Board claims that the draft document is attorney work product. This Office cannot agree.

Under APRA, the work product of an attorney means, in relevant part, “information compiled by an attorney in reasonable anticipation of litigation.” *See* Ind. Code § 5-14-3-2(u).

Here, there is no indication that the draft document at issue in this case qualifies for the attorney work product exception to disclosure. The District Board and all public agencies should be mindful that the work product of an attorney is only nondisclosable to the extent that it is developed in the course of reasonable anticipation of litigation. Work product not germane to litigation would not qualify as an exemption.

Secondly, the District Board contends that draft documents or working copies are not public records. On the contrary, those documents are indeed public records by definition. *See* Ind. Code § 5-14-3-2(r).<sup>2</sup> Whether draft documents are disclosable in a particular case does not change their nature as public records that must be retained, managed, and eventually released upon request once an exemption expires. And again, to be clear, the deliberative exemption would expire once a draft comes before a governing body for a vote.

---

<sup>2</sup> “Public record” means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

## CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the City of Madison Historic District Board of Review did not err in withholding the draft document as deliberative material.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt  
Public Access Counselor